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Text

California Code of Regulations, Title 14, Chapter 6. Regulations for Implementation of the California Endangered Species Act

Article 3. Incidental Take Permit Guidelines for Timber Operations

787.0 Purpose and Scope of Regulations.

(a) The purpose of this article is to provide guidance in accordance with Section 2112 of the Fish and Game Code regarding the issuance of incidental take permits pursuant to Section 2081 of the Fish and Game Code for timber operations or activities that may take coho salmon, a species that is listed as threatened or endangered under the California Endangered Species Act, Fish and Game Code sections 2050, et seq. ("CESA"). The Fish and Game Commission approved the *Recovery Strategy for California Coho Salmon (Oncorhynchus kisutch)* (February 2004) Southern Oregon-Northern California Coast and California Central Coast Coho Evolutionary Significant Units, and south of San Francisco Bay, and approved for inclusion specified policies pursuant Section 2112 of the Fish and Game Code to guide the issuance of incidental take permits under Section 2081 of the Fish and Game Code for timber operations or activities. This article implements those policies. In accordance with section 2112 of the Fish and Game Code, this article specifies conditions and circumstances when: (1) take is prohibited; (2) an incidental take permit is required; and (3) an incidental take permit is not required. The intent is to provide an expedited process for obtaining incidental take permits by certification pursuant to these regulations for certain timber operations and activities. This article also outlines various ways to obtain incidental take permits for timber operations and activities through the normal permitting process set forth in CESA implementing regulations, California Code of Regulations, title 14, section 783.0

et seq. The standards for issuance of incidental take permits are the permit issuance criteria set forth in section 2081(b) and (c) of the Fish and Game Code. This article is not intended to create a presumption that any particular timber operation or activity will incidentally take coho salmon.

(b) This article does not affect the Department's authority to authorize take pursuant to any other provision of the Fish and Game Code or any other provision of the California Code of Regulations including, but not limited to, take authorizations issued or approved by the Department pursuant to section 2835 of the Fish and Game Code.

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787.1. Definitions.

(a) The terms used in this article are defined by the definitions provided in the Forest Practice Rules, California Code of Regulations, title 14, section 895.1, *et seq.*, except as specifically provided in this article:

(1) Coho Salmon Impact Evaluation. A "coho salmon impact evaluation" is an evaluation by the Department of potential impacts of proposed timber operations to coho salmon, conducted in accordance with section 787.9 of this article.

(2) Jeopardy Determination. A "jeopardy determination" is the Department's determination, made in accordance with section 787.6 of this article, as to whether issuance of an incidental take permit for proposed timber operations activities would jeopardize the continued existence of coho salmon.

(3) Recovery Unit. A "recovery unit" is a group of watersheds related hydrologically, geologically and ecologically which constitute unique and important components of an Evolutionarily Significant Unit for coho salmon. The coho salmon recovery units are delineated and described in the *Recovery Strategy for California Coho Salmon (Oncorhynchus kisutch)* (February 2004), inclusive of amendments.

(4) Watersheds with Coho Salmon. "Watersheds with coho salmon" means a planning watershed where historic or current runs of coho salmon have been documented or restorable habitat for coho salmon exists.

787.2 Take Determination for Timber Operations.

(a) When acting as a Lead, Responsible or Trustee Agency under the California Environmental Quality Act, Public Resources Code section 21000 *et seq.* ("CEQA"), where timber operations are proposed in watersheds with coho salmon, the Department will prepare a "coho salmon impact evaluation" in accordance with section 787.9 of this article and determine whether the proposed timber operations will or are likely to take one or more life stages of coho salmon.

(b) The following is a list of activities that could potentially take coho salmon. This list is not exhaustive; it is intended to illustrate examples:

- (1) Construction, maintenance, replacement and removal of watercourse crossings (e.g., culverts, bridges and Humboldt crossings);
- (2) Watercourse bank stabilization;
- (3) Construction, maintenance, replacement, removal and use of fords (i.e., low water crossings);
- (4) Development, maintenance and operation of water diversion and drafting sites;
- (5) Construction, maintenance, and use of segments of roads, skid trails, landings and associated drainage facilities hydrologically connected to watercourses;
- (6) Any physical modification of a channel zone including removal of large wood from a Class I channel zone;
- (7) Landslides initiated or accelerated by timber operations;
- (8) Timber operations in a Class I watercourse and lake protection zone, accessible to coho salmon;

787.3 Take of Coho Salmon from Timber Operations Prohibited.

(a) Any unauthorized take of coho salmon is prohibited and may be subject to criminal action pursuant to the Fish and Game Code.

787.4. Incidental Take Permit for Timber Operations Required.

(a) If the Department determines that proposed timber operations, including activities specified in section 787.2(b) of this article, could potentially take coho salmon, and the proposed project is not revised to avoid take in accordance with section 787.5 of this article, the Department may authorize incidental take of coho salmon by issuing a permit under the authority of Section 2081 of the Fish and Game Code using any of the following processes if subsection (b) of this section is met:

(1) Incidental take permit by certification. The Department may issue an incidental take permit by certification pursuant to section 787.7 of this article for timber operations that are not the subject of a timberland conversion permit when timber operations in watersheds with coho salmon incorporate all of the

minimization and mitigation measures set forth in Forest Practice Rules, California Code of Regulations, title 14, sections [to be added] ;

(2) Incidental take permit incorporating selected measures. An applicant may propose, and the Department will consider an incidental take permit application prepared in accordance with CESA implementing regulations, California Code of Regulations, title 14, section 783.0 *et seq.*, for timber operations that incorporate selected measures from Forest Practice Rules, California Code of Regulations, title 14, section s [to be added]. The Department may issue an incidental take permit that incorporates selected minimization and mitigation measures from Forest Practice Rules, California Code of Regulations, title 14, section s [to be added], as determined by the Department on a case-by-case basis.

(3) Incidental take permit incorporating watershed evaluation-based measures. An applicant may propose, and the Department will consider an incidental take permit application prepared in accordance with CESA implementing regulations, California Code of Regulations, title 14, section 783.0 *et seq.*, for timber operations that incorporate minimization and mitigation measures based on a watershed evaluation. The watershed evaluation must include the components set forth below and shall be included in addition to the requirements of California Code of Regulations, title 14, section 783.2(a). The Department may issue an incidental take permit in accordance with CESA implementing regulations, California Code of Regulations, title 14, section 783.0 *et seq.*, for timber operations that incorporate minimization and mitigation measures based upon an evaluation of watershed conditions, risks and limiting factors for coho salmon where the timber operations are proposed.

(A) The following are required components of a watershed evaluation:

(i) Description of assessment area

(ii) Status of coho salmon within each planning watershed in the assessment area

(iii) Status of coho salmon habitat conditions and water quality within each planning watershed in the assessment area

(iv) Identification and prioritization of limiting factors. A reasoned analysis shall assign ratings of high, moderate and low to those factors which may individually or cumulatively limit coho salmon distribution and abundance in the watershed.

(v) Proposed planning watershed specific management practices to prevent or control discharges and environmental impacts from timber operations that could contribute to the identified high and moderate risk limiting factors, and; corrective actions that would reduce or eliminate the high and moderate risk limiting factors on the landscape and mitigate the impacts of timber operations which cause or contribute to those limiting factors.

(vi) A plan and schedule for implementing proposed management practices.

(vii) A program for monitoring implementation and effectiveness of the management practices and, where the plan is not effective in limiting or eliminating the limiting factors as planned an adaptive management strategy for changing the plan and schedule to ensure that limiting factors are reduced or eliminated in the watershed.

(4) Incidental take permit incorporating alternative measures. An applicant may propose, and the Department will consider an incidental take permit application prepared in accordance with CESA implementing regulations, California Code of Regulations, title 14, section 783.0 *et seq.*, that incorporates one or more minimization and mitigation measures not set forth in section Forest Practice Rules, California Code of Regulations, title 14, sections [to be added] and not based on an evaluation of watershed conditions, risks, and limiting factors. The Department may issue an incidental take permit in accordance with CESA implementing regulations, California Code of Regulations, title 14, section 783.0 *et seq.*, for timber operations the incorporate such alternative minimization and mitigation measures.

(b) In order to issue an incidental take permit under the processes outlined in this section, the permit issuance criteria set forth in Section 2081(b) of the Fish and Game Code must be met. In addition, as required by Section 2081(c) of the Fish and Game Code, the Department shall not issue an incidental take permit for coho salmon if issuance of the permit would jeopardize the continued existence of the species. The Department will determine whether issuance of the permit would jeopardize the continued existence of the species in accordance with section 787.6 of this article.

787.5. Incidental Take Permit for Timber Operations Not Required.

(a) If the Department determines proposed timber operations will avoid take of coho salmon, an incidental take permit under section 2081 of the Fish and Game Code is not required.

(b) If the Department determines proposed timber operations, including activities specified in section 787.2(a) of this article, could potentially take coho salmon, and as a result of a request by the project proponent or Lead Agency to consult with the Department, the project proponent revises or incorporates specific measures into the proposed project or the Lead Agency requires specific measures to be incorporated into the proposed project that the Department determines will avoid take, an incidental take permit under section 2081 of the Fish and Game Code is not required.

(c) If the Department determines pursuant to section 2080.1 of the Fish and Game Code that an incidental take statement or permit for coho salmon issued by the Secretary of Commerce for proposed timber operations is consistent with CESA, no further authorization or approval is necessary. An incidental take permit under section 2081 of the Fish and Game Code is not required.

(d) Regardless of whether the Department first makes a determination regarding the take of coho salmon, the Department and any project proponent may enter into a memorandum of understanding or a planning agreement pursuant to section 2810 of the Fish and Game Code that specifies project revisions, guidelines, or take avoidance measures, which the Department concludes will avoid take. An incidental take permit under section 2081 of the Fish and Game Code is not required for timber operations or activities carried out in accordance with any such memorandum of understanding or planning agreement.

787.6. Jeopardy from Timber Operations Prohibited

(a) If the Department determines that take will, or is likely to result from proposed timber operations, the Department must conduct an additional analysis to determine if issuance of an incidental take permit for the proposed timber operations will jeopardize the continued existence of coho salmon. This means determining whether issuance of an incidental take permit for proposed activities would be expected, directly or indirectly, to substantially reduce the likelihood of survival of coho salmon in the wild by reducing the reproduction, numbers or distribution of the species.

(b) A jeopardy determination will be made using an analysis at the scale of the coho salmon recovery unit and will be made for the Evolutionarily Significant Unit. A jeopardy determination must be based upon the best scientific and other information that is reasonably available, which may include, but not necessarily be limited to, consideration of:

(1) coho salmon's ability to survive and reproduce; and

(2) any adverse impacts of the taking on coho salmon's ability to survive and reproduce in light of :

(A) known population trends;

(B) known threats to the species; and

(C) reasonably foreseeable impacts on the species from other related projects and activities.

(c) The Department could determine that proposed timber operations will jeopardize the continued existence of coho salmon if one or more of the following criteria are met and the impact will likely reduce the numbers of coho salmon in the recovery unit returning to spawn successfully in future years.

(1) One or more cohorts of coho salmon within the recovery unit return in very low numbers, or not at all, and timber operations will likely "take" a substantial number of any life stage of coho salmon.

(2) Timber operations will create a barrier to passage or substantially reduce access by coho salmon to any habitat used for migration, spawning or rearing.

(3) One or more cohorts of coho salmon within the recovery unit return in very low numbers, or not at all, and timber operations will directly or incrementally through cumulative effects render existing spawning or rearing habitat unsuitable for continued use by coho salmon.

(4) Exceptional project specific circumstances exist or are proposed which will reduce the numbers of coho salmon in the recovery unit returning to spawn successfully in future years.

(d) Where the Department determines that proposed timber operations are likely to jeopardize the continued existence of coho salmon, the Department shall consult, upon request by the project proponent or Lead Agency, and specify reasonable and prudent minimization and mitigation measures which, if fully implemented, will avoid jeopardy while maintaining the project purpose to the greatest extent possible.

(e) Where, following such consultation, the project proponent declines to incorporate all of the specified reasonable and prudent minimization and mitigation measures into the proposed project, the Department shall not issue an incidental take permit. If, however, the project proponent agrees to incorporate all of the specified reasonable and prudent minimization and mitigation measures into the proposed project to avoid jeopardy, the Department may issue an

incidental take permit if the permit issuance criteria set forth in Section 2081(b) are met.

787.7 Incidental Take Permit by Certification for Timber Operations

(a) The Department may permit incidental take of coho salmon from timber operations by certification of compliance under this section if all of the following are satisfied:

(1) The permittee certifies in writing that the permittee agrees to comply with and incorporate into its timber operations all minimization and mitigation measures specified in Forest Practice Rules, California Code of Regulations, title 14, sections [to be added] as identified and described in a THP or Notice of Timber Operations attached to the certification. (Where the permittee intends to propose alternative measures, as provided in section 787.4(a)(4) of this article, those measures must be specified. Preconsultation with the Department prior to submittal of the certification and attached THP or Notice of Timber Operations is strongly recommended in order to facilitate acceptance and return receipt of the certification.).

(2) The permittee provides a financial security for performance in a form and amount acceptable to the Department in accordance with section 787.8 of this article.

(3) The permittee provides written consent to the Department for access to inspect timber operations during and following completion of operations for compliance monitoring.

(4) The Department returns a signed receipt of the certification finding that it meets the requirements of Sections 2081(b) and (c) of the Fish and Game Code. If any of these requirements is not met (e.g., a financial security in a form and amount acceptable to the Department is not provided), the Department shall not sign and return receipt of the certification.

(5) The THP or Notice of Timber Operations which is the subject of the certification is approved by the California Department of Forestry and Fire Protection.

(b) Effect of Certification.

(1) A certification that is signed by the Department is an incidental take permit for coho salmon that becomes effective only after both of the following have occurred:

(A) The THP or Notice of Timber Operations attached to the certification, which contains the required minimization and mitigation measures, is approved by the California Department of Forestry and Fire Protection; and

(B) The permittee receives the signed certification from the Department from the appropriate regional office.

(2) The incidental take permit by certification authorizes incidental take of coho salmon from the timber operations described in the THP or Notice of Timber Operations that is attached to the certification. Any incidental take from operations that deviate from such timber operations, whether under subsequent amendments to the THP or Notice of Timber Operations or otherwise, is not authorized by this permit by certification.

(3) CESA implementing regulations governing permit revocation and suspension (California Code of Regulations, title 14, section 783.7) apply to an incidental take permit by certification.

(c) Form of Certification. The certification required by section 787.7 of this article shall take the following form:

CERTIFICATION OF COMPLIANCE

I certify that all of the minimization and mitigation measures set forth in Forest Practice Rules, California Code of Regulations, title 14, sections [to be added], including any alternative measures, as provided in sections [to be added] are included as enforceable elements of the attached Timber Harvesting Plan (THP) or Nonindustrial Timber Management Plan (NTMP) Notice of Timber Operations.

I acknowledge that these measures are roughly proportional in extent to the impact of the authorized take of the species, the measures maintain my project objectives to the greatest extent possible, and they are capable of successful implementation. I understand that this permit allows incidental take of coho salmon pursuant to CESA; it does not authorize the violation of any Federal, State or local laws or regulations. I understand that this incidental take permit becomes effective after both of the following have occurred: (1) the THP or Notice of Timber Operations containing the required measures is approved by the Department of Forestry and Fire Protection; and (2) I have received receipt of the certification signed by the Department of Fish and Game from the appropriate address below. I understand that this certification permits incidental take of coho salmon from the timber operations described in the attached THP or Notice of Timber Operations. Any incidental take from operations that deviate from such timber operations, whether under subsequent amendments to the THP or Notice of Timber Operations or otherwise, is not authorized by this permit by certification.

I certify that the information submitted in this certification is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein or failure to comply with the terms of the permit (e.g.,

unauthorized take under CESA for undertaking a project that differs from the one described in the attached THP or Notice of Timber Operations, or failure to properly implement required minimization and mitigation measures) may subject me to suspension or revocation of this permit and to civil and criminal penalties under the laws of the State of California.

THP or NTMP designation: _____

Proposed beginning date of timber operations: _____

End date for timber operations: _____

Attached is the security for performance, calculated in accordance with California Code of Regulations, title 14, section 787.8, ensuring adequate funding to implement measures to minimize and fully mitigate impacts of authorized take, and for monitoring compliance with and effectiveness of, those measures.

The undersigned is responsible for immediately notifying the Department of Fish and Game of any deviations from the above.

(RPF or authorized representative signature)

Date

The undersigned is authorized to provide consent to the Department of Fish and Game to access and inspect the subject timber operations during and following completion of operations, and hereby provides such authorization to the Department of Fish and Game.

(authorized representative signature)

Date

For Del Norte, Humboldt, Siskiyou and Trinity Counties

Regional Manager
Department of Fish and Game
601 Locust Street
Redding, CA 96001
(530) 225.2300

For Santa Cruz, San Mateo, Marin, Sonoma and Mendocino Counties

Regional Manager
Department of Fish and Game
P.O. Box 47
Yountville, CA 94599
(707) 944.5500

The Department of Fish and Game [circle one: finds/does not find] that: (1) the activities identified in the attached THP or NTMP Notice of Timber Operations may result in take

of coho salmon incidental to an otherwise lawful activity; where the Department of Fish and Game finds that the activities may result in incidental take, the Department of Fish and Game finds that: (2) the impacts of authorized take will be minimized and fully mitigated; the measures required to meet this obligation are roughly proportional in extent to the impact of the authorized take; where various measures are available to meet this obligation, the impacts of take, the measures maintain the applicant's objectives to the greatest extent possible; and the measures are capable of successful implementation; (3) this permit by certification of compliance is consistent with regulations adopted pursuant to Sections 2112 and 2114 of the Fish and Game Code; (4) the permittee has assured adequate funding to implement the required measures and for monitoring compliance with and effectiveness of those measures; (5) and issuance of the permit by certification which is approved by the signature below will not jeopardize the continued existence of coho salmon. The Department of Fish and Game's findings are based upon the certification submitted; the approved THP or Notice of Timber Operations and associated environmental review and impact analysis; the administrative records supporting the incorporated Forest Practice Rules, California Code of Regulations, title 14, sections [to be added], and the Incidental Take Permit Guidelines for Timber Operations, California Code of Regulations, title 14, section 787.0 *et seq.*, and other information the Department of Fish and Game had before it at the time of the certification.

DFG Regional Manager

Date

787.8 Security for Performance for Incidental Take Permit by Certification

(a) As required by Fish and Game Code section 2081(b)(4) and CESA implementing regulations, California Code of Regulations, title 14, section 783.4(a)(4), the permit applicant must assure adequate funding to implement the required measures and for monitoring compliance with, and effectiveness of, those measures. Acceptable forms of financial security include a pledged savings or trust account, certificate of deposit, or irrevocable letter of credit. Security must be provided to the appropriate Department Regional Manager by certified mail together with the Certification of Compliance.

(b) Security shall be provided in an amount in accordance with the following and shall include a Road Component and an Area Component.

(1) Road Component

(A) The security for performance for the Road Component shall be calculated at the rate of \$5,000/mile for all roads appurtenant to the proposed THP or Notice of Timber Operations.

(B) The security for performance for the Road Component will be returned to the permittee upon completion of the Prescribed Maintenance Period provided that all requirements of Forest Practice Rules, California Code of Regulations, title 14, sections [list road measure sections] have been properly implemented.

(C) The security for performance for the Road Component will be forfeited by the permittee if all of the requirements of Forest Practice Rules, California Code of

Regulations, title 14, sections [list road measure sections] have not been properly implemented, except that the Department may, at its discretion, return all or part of the security for performance of an applicable component if in the Department's judgment the Permittee has completely remedied its failure to properly implement a required measure or measures.

(2) Area Component

(A) The security for performance for the Area Component shall be calculated at the rate of \$100/acre for all proposed harvest units.

(B) The security for performance for the Area Component will be returned to the permittee upon filing of the Notice of Completion, provided that all requirements of Forest Practice Rules, California Code of Regulations, title 14, sections [list watercourse and mass wasting sections] have been properly implemented.

(C) The security for performance for the Area Component Security will be forfeited by the permittee if all of the requirements of Forest Practice Rules, California Code of Regulations, title 14, sections [list watercourse and mass wasting sections] have not been properly implemented, except that the Department may, at its discretion, return all or part of the security for performance of an applicable component if in the Department's judgment the Permittee has completely remedied its failure to properly implement a required measure or measures.

(c) Notwithstanding, Section 787.7(a) of this article, the Department may, at its discretion, refuse to permit incidental take of coho salmon from timber operations by certification of compliance under this article if the applicant previously obtained an incidental take permit by certification of compliance under this article and the security for performance for that permit was forfeited in whole or part for a failure to properly implement a required measure or measures.

787.9 Coho Salmon Impact Evaluation

(a) When acting as a Lead, Responsible, or Trustee Agency under CEQA, the Department will evaluate potential impacts of proposed timber operations on coho salmon. Where the Department is a Responsible or Trustee Agency, the Department shall provide a reasoned analysis and determination, to the extent possible within the time frames established by regulation for environmental review and within any written communication to the Lead Agency addressing any other trustee responsibilities of the Department.

(b) The Department may determine that proposed timber operations will have potentially significant impacts within watersheds with coho salmon if one or more of the following criteria are met:

(1) One or more cohorts of coho salmon return in low numbers or not at all, and timber operations will contribute net additional sediment to spawning and rearing

habitat in the planning watershed where timber operations are proposed or the planning watershed immediately downstream.

(2) One or more cohorts of coho salmon return in very low numbers, or not at all, and timber operations will further reduce shading within a Class I watercourse and lake protection zone accessible to coho salmon, in a planning watershed where water temperatures limit habitat suitability for any life stage of coho salmon.

(3) One or more cohorts of coho salmon return in very low numbers, or not at all, and timber operations will reduce the potential for recruitment of functional large woody material from the Class I watercourse and lake protection zone into a Class I watercourse accessible to coho salmon in a planning watershed where excessive sediment impairs coho salmon spawning or rearing.

(4) A substantial number of coho salmon will likely be taken by the proposed timber operations. For this determination, "substantial " means that the impact will, by itself, reduce the likelihood of coho salmon returning to spawn successfully in future years.

(5) The proposed timber operations will likely reduce access to habitat used by coho salmon for migration, spawning or rearing.

(c) Where the Department determines that project impacts are likely to be significant, Department staff shall, upon request, consult with the project proponent or lead agency to identify and propose mitigation measures intended to reduce potentially significant impacts to a level which is less than significant.

(d) Where timber operations incorporate all of the measures set forth in Forest Practice Rules, California Code of Regulations, title 14, sections [], the Department shall conclude that any impacts pursuant to 787.9(b)(1-5) have been sufficiently mitigated to a level which is less than significant.

Authority cited: sections 702 and 2112, Fish and Game Code.